CCRB INVESTIGATIVE RECOMMENDATION

Investigator:		Team:	CCRB Case #:	V	Force	V	Discourt.	☐ U.S.
Ariel Courage		Squad #6	201603532	Ø	Abuse	$\overline{\checkmark}$	O.L.	✓ Injury
Incident Date(s)		Location of Incident:	1	F	Precinct:	18	Mo. SOL	EO SOL
Sunday, 04/17/2016 9:00 PM		Inside § 87(2)(b) Hospital		40		10/17/2017		10/17/2017
Date/Time CV Reported		CV Reported At: How CV Reported: Date/Time Received				eived at CCF	<u> </u>	
Mon, 04/18/2016 10:38 AM	Other	In-person				Л		
Complainant/Victim	Type Home Address							
Complamant/ victim	Турс	Home Addre						
Witness(es)		Home Addre	Dec					
Witness(es)		Home Addre	255					
Subject Officer(s)	Shield	TaxID	Command					
1. POM Malachi Mckenith	02680	945983	040 PCT					
2. POM Gerardo Bugalloberet	10452	956465	040 PCT					
Officer(s)	Allegatio	on			Inve	stiga	ator Recon	nmendation
A.POM Malachi Mckenith	Off. Language: Police Officer Malachi Mckenith made remarks to §87(2)(b) based upon race.							
B.POM Malachi Mckenith	Discourtesy: Police Officer Malachi Mckenith spoke discourteously to \$87(2)(6)							
C.POM Malachi Mckenith	Abuse: Police Officer Malachi Mckenith threatened with the use of force.							
D.POM Malachi Mckenith	Force: Police Officer Malachi Mckenith restricted §87(2)(b) s breathing.							
E.POM Malachi Mckenith	Force: Po	olice Officer Malachi M 87(2)(b)	ckenith used physica	al fo	orce			
F.POM Gerardo Bugalloberet		olice Officer Gerardo Bu ainst ^{§ 87(2)(b)}	ugalloberet used phy	sica	.1			

Case Summary

This case is being closed past the 90-day benchmark due to complications both in obtaining ser(2)(5) as medical records and in locating civilian witnesses, which caused severe delays.

On April 18, 2016, Sgt. Kevin Smalls of the 40th Precinct called IAB to report this incident on behalf of a prisoner, [Se7(2)(6)] (BR 01). On April 25, 2016, this complaint was received at the CCRB.

On April 14, 2016, \$37(2)(b) physically fought with another civilian, \$37(2)(b) \$37(2)(b) In the course of this fight, \$37(2)(b) sustained a cut to his lower lip, swelling to the right side of his head and temple, and a black right eye. The police were called, and PO Omar Habib from the 40th Precinct responded and arrested both \$37(2)(b) and \$37(2)(b) for assault in the second degree (BR 02). \$37(2)(b) was transported to \$37(2)(b) Hospital for treatment for his injuries. \$37(2)(b) made no allegations regarding anything that occurred at the scene of his arrest.

was admitted to \$87(2)(b) Hospital and received stitches to the cut on his lip. \$17(2)(c) remained at the hospital through \$87(2)(b) , under the guard of multiple different officers while handcuffed and shackled by his right arm and right leg to a cot in a private hospital room. On April 17, 2016, at 3:48 p.m., PO Malachi McKenith arrived at \$87(2)(b) Hospital to guard \$87(2)(b)

At first PO McKenith and \$57(2)(b) got along. PO McKenith linked his pair of handcuffs with the first pair, giving \$57(2)(b) more room to move his right arm. PO McKenith also offered to switch \$57(2)(b) shandcuffs from his right wrist to his left to make \$57(2)(b) more comfortable, an offer that \$57(2)(b) declined. Eventually, however, PO McKenith and \$57(2)(b) began speaking about religion. When \$57(2)(b) questioned PO McKenith's beliefs, PO McKenith grew angry with \$57(2)(b) and allegedly told him that because he did not want to learn about his beliefs, he was going to "stay a nigger," and, "stay in the hood." (Allegation A)

PO McKenith then left \$87(2)(b) s room, coming in and out periodically over the next few hours. At approximately 9 p.m. on April 17, 2016, \$87(2)(b) asked PO McKenith if he could switch the handcuffs from his right wrist to his left. PO McKenith refused to do so, telling that he had already offered to switch the handcuffs and that \$87(2)(b) had declined. PO McKenith and \$87(2)(b) had an argument, during which PO McKenith allegedly told \$87(2)(b) "Fuck you," and, "You come back to the precinct, I'll fuck you up" (Allegation B and C).

As the argument continued, PO McKenith told \$87(2)(b) "Fuck it. I'm taking my cuffs back." (**subsumed under Allegation B**) \$87(2)(b) refused to allow PO McKenith to take his handcuffs back. A struggle ensued, during which PO McKenith allegedly positioned himself on top of \$87(2)(b) on the hospital cot so that his knee pressed into \$87(2)(b) or s chest, restricting his breathing (**Allegation D**). PO McKenith then punched \$87(2)(b) in his face (**Allegation E**).

PO McKenith called out for assistance from another officer stationed on another area of the same floor, identified by the investigation as PO Gerardo Bugalloberet, who aided PO McKenith in retrieving his set of handcuffs (**Allegation F**).

As this incident occurred inside of a private hospital room, there is no video footage of it.

Mediation, Civil and Criminal Histories

- As \$87(2)(b) was under arrest at the time of this incident, this case was not eligible for mediation.
- On August 17, 2016, a Notice of Claim request was submitted to the Comptroller's office. The results will be added to the case file upon receipt (BR 03).

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•	§ 87(2)(b), § 87(2)(a) 160.50

Civilian and Officer CCRB Histories

- § 87(2)(b)
- PO McKenith has been a member of the service for 8 years. There are 21 CCRB allegations against him across 8 cases, the following of which were substantiated:
 - In CCRB case 201308493, allegations of threat of arrest and offensive language were substantiated. The Board recommended instructions and the NYPD penalty was command discipline B as well as instructions.
 - o In CCRB case 201400407, an allegation of physical force was substantiated. The Board's recommendation, and the NYPD penalty, was Command Discipline B.

Potential Issues

- During his CCRB interview on May 3, 2016, \$87(2)(b) refused to fully complete a HIPAA form so that his medical records from \$87(2)(b) Hospital could be accessed, though he was informed that this would likely result in rejection of the subpoena. On June 10, 2016, \$37(2)(b) Hospital rejected the subpoena for \$37(2)(b) s medical records (BR 13). On June 10, 2016, the investigation contacted \$87(2)(b) who said he was on vacation and would not be returning to New York until June 28, 2016, and that while he lacked the funds to appear at the CCRB, he would be willing to meet with the Field Team to fully complete a HIPAA form upon his return to New York. On June 28, 2016, the investigation attempted to contact \$87(2)(b) and left messages for him. On June 29, 2016. s 87(2)(b) contacted the CCRB and scheduled to meet the Field Team and sign a HIPAA form on July 1, 2016. On July 1, 2016, the Field Team visited \$87(2)(b) shome. was not home, and attempts to reach him by phone yielded negative results. On July 13, 2016, \$37(2)(5) called the CCRB and rescheduled to sign HIPAA forms on July 19, 2016. On July 19, 2016, the Field Team again visited \$87(2)(b) at home. \$87(2)(b) was not home, but when contacted by phone promised to contact the CCRB at a future date to sign HIPAA forms. To date, \$87(2)(5) has not again contacted the CCRB. Because \$ initially refused to fully complete the HIPAA forms and subsequently missed two scheduled appointments to do so, the CCRB was consequently unable to obtain s medical records.
- On May 6, 2016, a subpoena was sent to Hospital via certified mail for the testimony of hospital employees. By June 10, 2016, no response had been received from Hospital. Between June 10, 2016, and June 30, 2016, eight calls were placed to

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Hospital Risk Management to follow up on the status of this subpoena. On June 30, 2016, \$87(2)(6) Hospital concluded that they had not received the subpoena and requested that a new one be submitted. On July 1, 2016, a new subpoena was faxed to Hospital. After multiple further attempts to follow up, \$87(2)(b) Hospital eventually produced contact information for three witnesses on July 25, 2016. Contact was established with one of these witnesses, § 87(2)(b) on July 25, 2016. denied having any recollection of this incident. An appointment was scheduled for August 3, 2016, in attempt to show her documentation of the incident that might refresh her recollection, but § 87(2)(b) did not appear for this appointment and did not respond to subsequent contact attempts. On August 3, 2016, contact was established with § 87(2)(b) who similarly denied all recollection of this incident. On August 4, 2016, contact was established with \$87(2)(b) providing a telephone statement but abruptly terminated the call. §87(2)(b) respond to further contact attempts until August 17, 2016. Due to these delays, the case is consequently being submitted for closure 26 days after the 90-day benchmark: furthermore, the delay in establishing contact with these witnesses possibly diminished any recollection they may have had of this incident.

Findings and Recommendations

Allegation A – Offensive Language: Police Officer Malachi McKenith made remarks to based upon race.

The circumstances surrounding this allegation are essentially undisputed, although it is disputed whether or not PO McKenith made any offensive remarks to §87(2)(6)

As was previously discussed, \$87(2)(6) had been involved in a physical altercation with another civilian, as a result of which he was arrested and sustained injuries, notably a cut to his lower lip that required stitches. \$87(2)(6) was transported to \$87(2)(6) Hospital while in police custody, where he was held through April 17, 2016, when PO McKenith arrived to guard \$7(2)

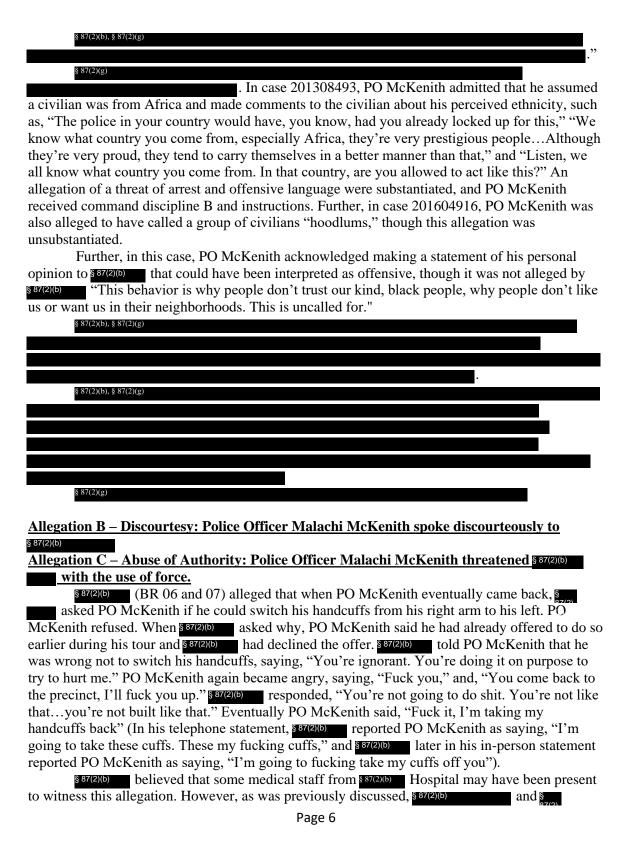
According to \$\frac{8}{27(2)(6)}\$ (BR 06 and 07), PO McKenith and \$\frac{8}{27(2)(6)}\$ initially spoke pleasantly to each other. PO McKenith introduced himself to \$\frac{8}{27(2)(6)}\$ was handcuffed by his right hand to the hospital cot. There was only one set of handcuffs attaching \$\frac{8}{27(2)(6)}\$ s right wrist to the cot, which meant he had a limited range of motion. PO McKenith offered to make \$\frac{8}{27(2)(6)}\$ more comfortable by linking his pair of handcuffs with that already on the cot, so that \$\frac{8}{27(2)(6)}\$ could move his right arm more freely, an offer that \$\frac{8}{27(2)(6)}\$ accepted. PO McKenith also offered to switch the handcuffs from \$\frac{8}{27(2)(6)}\$ s right wrist to his left wrist, but \$\frac{8}{27(2)(6)}\$ declined this offer, as he was using his right hand to hold an ice pack up to his bruised right eye at that time.

At some juncture PO McKenith brought up his religious affiliation. \$87(2)(b) told PO McKenith that he had no religion. \$87(2)(b) and PO McKenith had what was initially an innocuous discussion of PO McKenith's religious beliefs. Once \$87(2)(b) asked questions about PO McKenith's beliefs, however, PO McKenith became upset and told \$87(2)(b) that \$87(2)(b) that \$87(2)(b) as spirit did not want to change, and that \$87(2)(b) was consequently going to "stay a nigger," and "stay in the hood." (In his telephone statement (BR 06), \$87(2)(b) did not allege that PO McKenith said he would "stay a nigger," or "stay in the hood," but reported PO McKenith as saying that \$87(2)(b) did not want to

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help his own spirit). [37(2)[6] found this offensive as he felt PO McKenith did not really know his spirit. PO McKenith eventually became so upset that he left the room. While there was no other patient or medical staff in the room with §87(2)(b) McKenith at this time, \$37(2)(b) thought that some hospital staff may have overheard their argument. The investigation established contact with three employees of [887(2)(b)] Hospital, and § 87(2)(b) (BR 08) and § (BR 09) both professed to have no recollection of this incident. §87(2)(b) 11) remembered (\$87(2)(b) as being a particularly loud patient who made a lot of requests of the nurses, and remembered PO McKenith, but was not present to observe any argument between them and did not hear PO McKenith tell §87(2)(b) that he was going to "stay a nigger," or "stay in the hood." PO McKenith (BR 12) confirmed that once he arrived at \$87(2)(b) Hospital to guard \$ he introduced himself to \$87(2)(b) linked his pair of handcuffs with the pair attached to the cot, so that \$37(2)(b) would be more comfortable; and offered to switch the handcuffs from s right hand to his left, which § 87(2)(b) refused. PO McKenith then left the room to make a phone call. §87(2)(b) then called PO McKenith back into the room to ask questions about his arrest, telling PO McKenith that he thought he had been arrested on a warrant. PO McKenith explained to \$87(2)(b) that he had been arrested for assault, not on a warrant. PO McKenith then went back out into the hallway to finish his phone call. \$87(2)(b) then again called PO McKenith back into the room. \$87(2)(b) asked PO McKenith for confirmation that he had not been arrested on an open warrant. PO McKenith retrieved paperwork documenting §87(2)(b) s arrest and explained to him that it reflected had been arrested for fighting. § 87(2)(b) told PO McKenith that he did not understand why he had been arrested, as the other male had jumped him. PO McKenith told \$37(2) that he should consult with an attorney and again left the room. \$87(2)(b) then again called PO McKenith back into the room and said, "I need to listen to...music...you don't have nothing for me? You listen to rap?" PO McKenith told \$87(2)(6) that he listened only to gospel and jazz, as he had grown up a "church boy." 887(2)(b) eventually asked PO McKenith what his religion was. PO McKenith told \$87(2)(b) that he was a Black Hebrew Israelite. \$87(2)(b) asked PO McKenith what that entailed. PO McKenith provided with a list of all the beliefs of the Black Hebrew Israelites, \$87(2)(b) asked PO McKenith how he knew what he believed was the truth. PO McKenith gave \$87(2)(b) a few examples from Scripture, but ultimately told \$87(2)(b) that if he wanted to learn more, he should do his own research. § 87(2)(b) told PO McKenith, "You're just mad because you want me to believe what you believe." PO McKenith told [8] "I could care less what you believe. I'm going back outside." PO McKenith never told \$87(2)(b) that he was going to "stay a nigger," or "stay in the hood." PO McKenith acknowledged that at a later point during this incident he told §87(2)(6) that he was behaving ignorantly, stating, "This behavior is why people don't trust our kind, black people, why people don't like us or want us in their neighborhoods. This is uncalled for." PO McKenith did not otherwise mention race to § 87(2)(b) tried to ask PO McKenith further questions about his faith, but PO McKenith decided to leave the hospital room, as he did not want to "hear \$87(2)(b) s] mouth." \$87(2)(b) became upset once PO McKenith left the hospital room in that he cursed and screamed at PO McKenith, calling him a "douchebag," and saying, "You probably beat your wife at home. You probably ain't getting none."

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both denied having any recollection of this incident. § 87(2)(b) did not hear PO McKenith use profanity towards § 87(2)(b) PO McKenith (BR 12) said from outside of the hospital room he heard §87(2)(b) continually cursing and yelling. PO McKenith eventually went into the hospital room and told "Sir, I need you to take it easy. I came in here to have a conversation with you, to make you comfortable. I'm not going to make you comfortable anymore. I'm going to take the cuffs back and call it a day because you're being very difficult to me and to every other person on this ward and you're being disrespectful to my family by calling my wife a name and I don't appreciate that. I really don't. So, being that you don't appreciate my act of kindness, I'm going to take the cuffs." PO McKenith felt he had to do this in order to retain control of the situation, as he was tasked with guarding \$87(2)(b) and therefore could not simply walk away from him. reacted by saying, "You're not going to take the cuffs. Don't touch me. Get the fuck away from me. I'm going to hit you. You're frail. The only reason you're acting like this is because you got a gun. The only reason why you're a cop is because you got picked on as a child...Outside this uniform, you ain't nobody." PO McKenith acknowledged that he told "You know what my precinct is. If you feel like that, come see me. It makes no sense for us to keep going on like this. I'm always at the precinct, I don't go nowhere," but denied that he ever threatened to "fuck him up," or fight him at the precinct. PO McKenith denied that he ever said, "Fuck it," "Fuck you," or "Fuck it, I'm going to take my cuffs back." PO McKenith denied using any profanity whatsoever towards § 87(2)(6) and does not generally curse. § 87(2)(b), § 87(2)(g) Allegation D – Force: Police Officer Malachi McKenith restricted §87(2)(6) breathing. Allegation E – Force: Police Officer Malachi McKenith used physical force against § 87(2)(b) Allegation F – Force: Police Officer Gerardo Bugalloberet used physical force against It is undisputed that PO McKenith attempted to take his handcuffs back from \$87(2)(b) It is also not disputed that \$87(2)(5) physically resisted PO McKenith's attempts to retrieve the handcuff, § 87(2)(b), § 87(2)(g) . It is also not disputed that PO Bugalloberet aided PO McKenith in overcoming § 87(2)(b) s resistance. (BR 06 and 07) said that when PO McKenith told him he would take his handcuffs back, §87(2)(b) said, "I'm not going to let you take your cuffs back." PO McKenith then climbed atop \$87(2)(b) so that his knee was pressed against \$87(2)(b) s chest. \$87(2)(b) had difficulty breathing due to PO McKenith's weight on his body, but was still able to scream for help, and repeatedly said that he would not let PO McKenith take the handcuffs back. attempted to push PO McKenith off of him by pressing his free hand into PO McKenith's chest. PO McKenith then punched \$87(2)(6) twice, one the left side of his chin and a second time on the right side of his head or temple. §87(2)(b) sustained no injuries from this aside from exacerbation

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of the pain and swelling he already had from the injuries he had previously sustained. § 37(2)(5) then pushed PO McKenith a second time on his chest. Medical staff and another police officer, identified by the investigation as PO Bugalloberet, then came into the room. PO Bugalloberet attempted to grab (\$187(2)(5)) solutions left arm and handcuff it to the cot. § 37(2)(b) continued to scream and tell the officers that he was not going to allow them to handcuff him, but denied that he physically resisted beyond twice PO McKenith off of him. Once PO Bugalloberet handcuffed \$87(2)(b) s left hand to the cot, PO McKenith removed his pair of handcuffs from \$87(2)(b) without incident. Due to \$87(2)(6) s aforementioned failure to complete a HIPAA form, his medical records could not be obtained, and the investigation therefore has no means of assessing the severity of his injuries. Two images were taken of \$87(2)(6) s injuries (BR 14 and 15) and one of his hospital wristband (BR 16) by IAB investigators after this incident, but ultimately IAB determined that the case was outside guidelines and no further inquiry was conducted (BR 17). Two of the three possible witnesses identified by the investigation, § 87(2)(6) denied having any recollection of this incident. § 87(2)(b), § 87(2)(g) . The third witness, said that she only came into the room after the struggle between \$87(2)(b) and PO McKenith had ended. §87(2)(b) knew there had been some kind of struggle as she heard § yelling, "He hit me, he hit me," in reference to PO McKenith. PO McKenith acknowledged that he may have accidentally hit \$87(2)(b) but said that it was only in reaction to \$87(2)(b) striking him first. § 87(2)(b) never complained to § 87(2)(b) of any difficulty breathing. § had no recollection of observing any injuries to \$87(2)(b) aside from those that had been present before the struggle. PO McKenith confirmed that once he told § 37(2)(b) he was going to take his handcuffs back, § 87(2)(b) told him that he would not allow him to do so. Before PO McKenith made contact with § 87(2)(b) swung his free arm at PO McKenith. \$87(2)(6) s palm was open, so it appeared that this was more of a gesture for PO McKenith to get back than that \(\begin{aligned} \quad \text{SY(2)(b)} \end{aligned} \) attempting to strike him. PO McKenith moved forward to the right side of §87(2)(b) s cot and attempted to grab his set of handcuffs. \$87(2)(6) then pushed PO McKenith back by pressing on his chest. PO McKenith yelled repeatedly, "Don't fight me. Stop. I don't want to hurt you." PO McKenith held down on the cot by pressing one of his hands against \(\) 87(2)(b) s chest. PO McKenith never pressed his knee against \$87(2)(b) s chest or otherwise made contact with \$87(2)(b) s chest, noting that it would have been nearly physically impossible to do so as the cot was in the upright position. PO McKenith never punched \$87(2)(b) or otherwise made contact with \$87(2)(b) face. PO McKenith briefly left [307(2)[6]] s cot to go to the hallway and call for the assistance of PO Bugalloberet. PO McKenith's yelling drew both PO Bugalloberet and medical staff from Hospital into the room. While PO McKenith was calling for PO Bugalloberet, \$87(2)(6) began complaining that he could not breathe and that his face hurt, although no one was making contact with him at that time. PO Bugalloberet approached on the left side of \$87(2)(b) s cot and held \$87(2)(b) down by pressing on his shoulders. Neither PO McKenith nor PO Bugalloberet were ever directly on top of \$87(2)(b) McKenith was primarily positioned towards the far end of the cot, near s legs. PO McKenith used his shin to press against \$87(2)(b) s legs to prevent him from

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kicking, as \$87(2)(b) was only shackled by one leg to the cot. Once PO Bugalloberet arrived and held \$87(2)(6) down, PO McKenith was able to retrieve his set of handcuffs. PO Bugalloberet resigned from the force before he could be interviewed by the investigation (BR 18). Members of service will only use the reasonable force necessary to gain control or custody of a subject. Officers are to avoid actions which may result in chest compression, such as sitting, kneeling, or standing on a subject's chest or back, thereby reducing the ability to breathe. Patrol Guide Procedure 221-01 (BR 19) § 87(2)(b), § 87(2)(g) § 87(2)(b), § 87(2)(g) Squad: Investigator: Print Signature Date Squad Leader: _

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Print

Date

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Reviewer:

Title/Signature

Title/Signature Print Date

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